DEC 18 2002

No. 02-347

IN THE

Supreme Court of the United States

JAMES E. LOSKILL,

Petitioner,

v.

BARNETT BANKS, INC. SEVERANCE PAY PLAN, EMPLOYEE BENEFITS COMMITTEE OF THE BARNETT BANKS, INC. SEVERANCE PAY PLAN, NATIONSBANK CORPORATION CORPORATE BENEFITS COMMITTEE, and NATIONSBANK BENEFITS APPEALS COMMITTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

ROBERT KOFMAN*
SUSAN TOEPFER
STEARNS, WEAVER, MILLER,
WEISSLER, ALHADEFF & SITTERSON
Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3200

Attorneys for Respondents

* *Counsel of Record*

177951

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents in this action are Barnett Banks, Inc. Severance Pay Plan, Employee Benefits Committee of the Barnett Banks, Inc. Severance Pay Plan, NationsBank Corporation Corporate Benefits Committee, and NationsBank Benefits Appeals Committee. Bank of America Corporation, a publicly traded corporation, is a related entity. None of the respondents has a parent corporation and no publicly traded corporation owns 10 percent or more of the stock of any such respondent.

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STATEMENT OF THE CASE

I. Nature of the case

This action arises from a November 19, 1997 amendment to the Barnett Banks, Inc. Severance Pay Plan (the "Plan"). On that date, Barnett's Board of Directors approved a Plan amendment that required employees to execute a release of certain claims as a precondition to receiving certain severance benefits under the Plan (the "release amendment"). Releases of this type, as petitioner does not and cannot dispute, are common in ERISA-governed severance plans. After four years of litigation, however, petitioner now argues—for the first time in this Court—that the release amendment is invalid because the lower courts incorrectly required a showing of "bad faith, active concealment or detrimental reliance" before a mere technical violation of the Plan's amendment procedures results in invalidation of the Plan amendment.

The petition pointedly fails to disclose that petitioner failed to raise this "bad faith" issue in the district court, then failed again to raise it in the court of appeals, *i.e.*, petitioner never before disputed that such "bad faith" must be shown before a technical procedural violation invalidates a plan amendment. It is likewise clear (and likewise obscured in the petition) that: (i) there is no basis in the burgeoning body of ERISA case law to impose liability in circumstances such as those presented here, where—even assuming a technical violation of a plan's amendment procedure—there has been no showing whatsoever of bad faith, active concealment or detrimental reliance in connection with a plan amendment, and (ii) there is no division of authority in any of the lower courts with respect to the governing rule of law. Indeed, as

the Eleventh Circuit observed below, the general and well-established rule is that "courts typically will not invalidate an amendment for technical violations of a plan's procedures absent a showing of bad faith or active concealment on the part of the sponsor, or detrimental reliance on the part of the beneficiaries." App. 7 (citing cases). Moreover, as explained *infra*, the factual predicate of this claim—that the release amendment was not adopted in conformity with Plan amendment procedures—is untrue as a factual matter, was not established in the decision below, and is not now before this Court. Nonetheless, alleging that the release amendment was not adopted in strict conformity with the Plan's amendment procedures, petitioner now insists that the Barnett Board's plainly permissible action must be held invalid notwithstanding the complete absence of bad faith, active concealment or detrimental reliance.

Thus, the question petitioner would now present to this Court is not fairly presented on the facts or procedural posture of the case. As set forth below, the petition is an inappropriate candidate for this Court's review and should be denied.

II. Statement of facts

The Plan was a Barnett-sponsored, ERISA-governed welfare benefit plan which provided that eligible employees were entitled to receive a cash benefit upon a qualifying termination of employment.

On August 29, 1997, Barnett entered into a merger agreement with NationsBank whereby Barnett shareholders would receive shares of NationsBank stock in exchange for their shares of Barnett stock. Shortly after the merger agreement was entered into, a NationsBank representative

suggested to a Barnett human resources official that Barnett consider adopting the release amendment. Executives in Barnett's human resources office considered the idea and decided that it was reasonable and consistent with Barnett's purposes for maintaining the Plan. The human resources staff therefore asked Barnett's corporate secretary to place a proposed release amendment on the agenda for consideration at the next meeting of the Barnett Board of Directors. App. 2.

Once on the Board agenda, the release amendment was directed to the Board subcommittee with responsibility for employee benefits issues—the Executive Compensation and Management Development Committee. Upon deliberation on November 19, 1997, this committee recommended approval of the release amendment by the full Board. App. 3. Later that same day, after determining that it made good business sense, the Board adopted the release amendment which provides:

> Notwithstanding any provision of the Plan to the contrary, Severance Benefits shall not be paid to an employee unless and until the Employee delivers a full release to his Employers of all employment-related claims, including all rights and claims under the Age Discrimination in Employment Act of 1967, as amended ("ADEA").

App. 3. The NationsBank merger was approved by the Barnett shareholders on December 19, 1997, and was consummated on January 9, 1998. App. 2.

Petitioner Loskill was the President of Barnett Bank, N.A., Pinellas County, a wholly-owned subsidiary of Barnett. Loskill's employment was terminated following the merger. In connection with his termination, and in addition to a $600,000 payment Loskill received pursuant to his employment agreement (and $2.1 million in supplemental benefits Loskill had received at the time of the merger), NationsBank advised him that he would be entitled to $110,000 in severance benefits under the Plan if he executed a release. Loskill declined to sign a release and instead filed a formal claim for benefits with the Plan administrator on July 31, 1998. After receiving and considering submissions from Loskill's attorney, the NationsBank Benefits Appeals Committee denied Loskill's claim, finding that he would be entitled to the $110,000 in benefits only if he executed a release. App. 3.

III. Course of the proceedings below

On October 6, 1998, petitioner commenced this action against the Plan in the United States District Court for the Middle District of Florida. The complaint, as amended, alleged that (i) the release amendment violated the Plan's No Cut Back provision[1] and (ii) the release amendment was invalid because it was not adopted in accordance with the amendment procedures set forth in the Plan. App. 4.

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[1] The Plan's No Cut Back provision (§ 4.1(b)) reads as follows:

> No amendment will eliminate or reduce any Employee's right to Severance Benefits accrued before the effective date of the amendment, to an amount less than the amount he would have received if he had a Qualified Termination the day before the effective date of the amendment.

The parties cross-moved for summary judgment, and, by order dated June 28, 2000, the district court granted summary judgment in petitioner's favor on two distinct theories. First, the court held that in light of the Plan's No Cut Back provision, the release amendment could not apply to severance benefits accrued prior to November 19, 1997, the date the amendment was adopted. App. 27.

Second, the district court concluded that the procedure by which the Barnett Board adopted the release amendment violated the Plan's amendment provision. App. 30. The court recognized, however, that a technical violation of the amendment provision could not, as a matter of settled law, operate to void the release amendment unless petitioner could also show *active concealment, detrimental reliance, or bad faith*. App. 31-32. Petitioner had never alleged—not in his Complaint, not in his summary judgment briefs, not anywhere else—the existence of active concealment, detrimental reliance or bad faith. Nonetheless, the district court found, *sua sponte*, that Barnett had acted in bad faith and that the release amendment was thus entirely void. App. 33.

Defendants appealed. In an Opinion and Order dated April 25, 2002, a panel of the Eleventh Circuit reversed both district court holdings. With respect to petitioner's No Cut Back claim, the Court of Appeals relied on this Court's decisions in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995) and *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996), to find that the release amendment was a condition precedent to benefits, and not a benefit cut-back. App. 6. Petitioner has now abandoned this claim and it is not presented upon the instant petition.

With respect to petitioner's claim that the release amendment violated the Plan's amendment procedures, both sides accepted on appeal that the amendment was valid even if adopted in technical violation of the plan's amendment procedures unless adopted in bad faith. Petitioner never disputed this point. The Eleventh Circuit held that the record contained no evidence to support the district court's finding that Barnett undertook the amendment in bad faith. Because the parties had effectively conceded that liability on the amendment procedure claim required a showing of bad faith—both accepted the bad faith standard as the operative legal rule—the Eleventh Circuit ended its analysis with its finding that bad faith could not be found on the existing record. The court thus declined to decide whether there had been a technical violation of the amendment procedure. App. 8-9.

It is for this reason that the appellate decision discloses no dispute and indeed no analysis with respect to the legal point petitioner would now bring to this Court: whether bad faith, active concealment or detrimental reliance is a necessary predicate to ERISA liability where there has been a technical violation of plan amendment procedures. Petitioner simply conceded this issue in the Eleventh Circuit.[2]

In dissent, Judge Rooney concluded that the district court's No Cut Back ruling should be affirmed. App. 10.

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[2] The appeals court did, however, observe that the compensation committee members and board members who considered, recommended and implemented the release amendment believed they were operating within the Plan's procedural requirements and would not have approved the amendment if they had not believed that they had the authority to do so. App. 9 & n.4.

Recognizing that this conclusion would dispose of the case, Judge Rooney declined to address the merits of petitioner's Plan amendment claim. App. 10. The dissent nevertheless suggested that the decision below was the first appellate decision to conclude that bad faith, active concealment or detrimental reliance was necessary to create liability for a technical violation of plan amendment procedures, but noted that the bad faith aspect of the opinion below was in accord with multiple and consistent district court rulings. App. 11-12. The dissent did not suggest any conflict on the point with any other ruling, appellate or otherwise; to the contrary, the dissent recognized that the majority view on the bad faith issue was in accord with an existing body of closely analogous caselaw. App. 12. Petitioner then sought panel rehearing and petitioned the Eleventh Circuit for rehearing en banc, which petitions were denied by orders dated June 19, 2002. App. 39-40.

REASONS FOR DENYING THE PETITION

Petitioner's argument—that technical violations of plan amendment procedures should create ERISA liability, even absent any showing of bad faith or active concealment on the part of the plan sponsor, or detrimental reliance on the part of the beneficiary—was never presented to or addressed by the court below. By repetitiously citing this Court's recent decisions in *Curtiss-Wright* and *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510 (1997)—which do not control the facts here and which, at any rate, are entirely consistent with the disposition below—petitioner attempts to create the illusion that the Eleventh Circuit failed to respect this Court's recent ERISA precedent. And by selectively and misleadingly citing various lower court authorities, petitioner attempts to portray the

lower courts as somehow divided with respect to the "bad faith" requirement for liability in cases of technical violations of plan amendment procedures.

But the reality of the matter is entirely otherwise. The petition should be barred at the threshold because petitioner never raised below the question he now purports to present. Moreover, the decision below is not only plainly correct, but it relies largely on, and interprets with entire fidelity, this Court's teaching in *Curtiss-Wright* and *Inter-Modal*. And notwithstanding petitioner's attempt to muddy the decisional waters, there is a *uniform* line of court of appeals and district court authority affirming that mere technical violations of amendment procedures, without a showing of bad faith, are insufficient to give rise to ERISA liability. There was no dissent from the panel ruling below on the issue petitioner now presses, no vote in favor of panel rehearing or rehearing en banc, and there is no countervailing authority anywhere. Review by this Court is unwarranted.

I. The question petitioner presents was never raised or briefed below.

Petitioner asks this Court to consider whether "the requirement that a participant establish bad faith, active concealment or detrimental reliance before invalidating an amendment to an ERISA welfare benefit plan . . . adopted in violation of the amendment procedures required by the plan" is consistent with ERISA § 402(b)(3) as interpreted by this Court's controlling case law. Pet. for Cert. at i. Because petitioner never raised this question below, the issue is waived and is not preserved for certiorari review.

In the district court, petitioner *never suggested* that ERISA liability for a technical violation of plan amendment procedures should attach absent a showing of bad faith. The district court, relying on a solid wall of caselaw, reached the unremarkable conclusion that such a showing was indeed prerequisite to the relief petitioner seeks. App. 31-32.

In the court of appeals, petitioner likewise never argued that a technical violation of plan amendment procedures could create ERISA liability absent a showing of bad faith. To the contrary, in his briefing to the Eleventh Circuit, petitioner exclusively chose to defend the lower court's finding that Barnett had acted in bad faith—thereby acknowledging the correct legal standard—and never once even so much as suggested that the district court's "bad faith" holding was not a correct statement of the law. *Cf. Heller* v. *Doe*, 509 U.S. 312, 319 (1993) (rejecting an argument for a heightened standard of review where the "parties [had] been litigating [the] case for years on the theory of rational-basis review, . . . [and thus] [i]t would [have] be[en] imprudent and unfair to inject a new standard at this stage in the litigation"); *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider petitioner's argument in favor of a particular legal standard where the contention had not been raised below and where, to the contrary, petitioner had represented to the court of appeals that a different legal standard would be "determinative of the issues in [the] case") (internal quotation marks omitted). Respondent, too, recognized the "bad faith" requirement as an appropriate statement of the law, and demonstrated through its briefing that no record evidence existed to support the district court's bad faith finding. Because the point dooms the instant petition, it merits emphasis: *in the court of appeals, the parties agreed that a showing of bad faith was required for*

ERISA liability and therefore never briefed the legal question that petitioner now presents; in consequence, the court of appeals decision contains no dilation on the point whatsoever.

That the "bad faith" question was undisputed below is clearly reflected in the Eleventh Circuit's decision. The opinion does not evaluate either the "bad faith" standard or the district court's determination to review the disputed Plan amendment for "bad faith," and certainly never passes upon a legal standard that had been effectively conceded. Rather, the Court of Appeals took the "bad faith" inquiry as a given—precisely because the litigants presented it as a given—and observed only the undisputed point that "courts typically will not invalidate an amendment for technical violations of a plan's procedures absent a showing of bad faith or active concealment on the part of the sponsor or detrimental reliance on the part of the beneficiaries." App. 7 (citing cases). Indeed, the court below relied on this conceded legal standard to avoid deciding the logically subsequent (and sharply contested) question whether the release amendment was implemented in accordance with the amendment provision. The Eleventh Circuit reasoned that this question—whether the amendment provision had in fact been violated—could not affect the outcome of the case in view of the lack of evidence supporting a bad faith finding under the unchallenged bad faith standard.[3]

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[3] The Eleventh Circuit therefore declined to address the very substantial evidence and arguments respondents presented to show that the amendments were adopted in accord with Plan amendment provisions. *See infra*.

Now, having lost on the *facts* below, petitioner would have this Court reconsider the *law* he has conceded throughout the litigation. Review under these circumstances is barred by this Court's "traditional rule . . . preclud[ing] a grant of certiorari . . . when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *see FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 224 (1990). The question presented is plainly unpreserved under this standard. Below, petitioner never questioned—not once—the "bad faith" standard he would now bring to the Court. And the Eleventh Circuit, far from "passing upon" the bad faith standard, simply accepted it as the law, relying on the concession of the parties. The treatment of the issue below falls far short of the requirement that "the Court of Appeals expressly rule[]" on a question pressed for the first time in this Court. *Williams*, 504 U.S. at 42; *cf. Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 580-81 (1978). This petition presents a simple circumstance "in which, after losing in the Court of Appeals, [petitioner] reversed its position"—a circumstance which plainly precludes Supreme Court review. *Williams*, 504 U.S. at 43.

The prudential concerns that animate this Court's salutary waiver rule are fully implicated here. Review of the question petitioner purports to present would undermine the assumption, basic to this Court's certiorari rules and to our system of justice, that the adversary process provides the best means for arriving at correct decisions. In order to preserve this process, the rules of appellate practice—which operate not only at this Court, but in appellate tribunals throughout the federal and state judiciaries—require that an issue be actually raised and debated by the parties below if it is to be preserved for later review. Petitioner has opportunistically

failed to honor this elementary principle, with the result that the question he brings to this Court has not benefited from briefing, argument, and judicial reflection below.

Review of this question now would not only do violence to principles of appellate practice, but it would unfairly prejudice respondents as well. Respondents, like the lower courts, have answered every legal and factual theory petitioner has devised throughout this four-year litigation. These theories have been found wanting by the Eleventh Circuit. Now, petitioner wishes to change direction by foisting upon this Court a question never before raised—and which very likely cannot be presented on the facts of this case. *See infra*. This is unfair surprise of the most basic sort and should not be countenanced by this Court. *See Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941) (the rule that "an appellate court does not give consideration to issues not raised below" is necessary to protect litigants from being "surprised on appeal").

II. There is no conflict with any decision of this Court.

The principal argument petitioner offers in support of the petition is his claim that the Eleventh Circuit decision conflicts with this Court's holdings in *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73 (1995) and *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510 (1997). In actuality, there is no conflict with either decision.

A. *Curtiss-Wright.*

Petitioner's marquee argument is that the Eleventh Circuit decision somehow conflicts with this Court's *Curtiss-Wright* decision. Pet. for Cert. 8-14. Even leaving to the side the fact that the decision below repeatedly cites and relies on *Curtiss-Wright* to undergird its analysis, App. 5-7, the argument is implausible on its face. The question presented in *Curtiss-Wright* was "whether a plan provision stating that [t]he Company reserves the right to amend the plan states a valid amendment procedure under § 402(b)(3)" of ERISA, which requires that ERISA plans provide "a procedure for amending such plan, and for identifying the persons who have authority to amend the plan." 514 U.S. at 75, 78; *see* 29 U.S.C. § 1102(b)(3). The Court held that general amendment provisions placing amendment power with "the Company" satisfy § 402(b)(3), rejecting the view that ERISA required a more detailed amendment procedure. 514 U.S. at 81-84.

Curtiss-Wright cannot possibly control this case or conflict with its disposition. There is no plausible suggestion here that the plan did not contain satisfactory amendment procedures in violation of § 402(b)(3)—indeed, the whole theory of petitioner's case is that the plan *did* contain satisfactory amendment procedures, but that they were not formally followed in every technical respect. Petitioner's lengthy quotations of *Curtiss-Wright* with respect to the need for amendment procedures are doubtless correct statements of the law, but they have no bearing on this case. There is simply no dispute that the Plan contained satisfactory amendment procedures, and there is and can be no claim that the Plan violates § 402(b)(3). Petitioner's assertion that the decision below somehow "conflicts" with *Curtiss-Wright* blinks reality.

Curtiss-Wright left open the question whether plan amendments should be treated as void *ab initio* whenever a plan is found not to have an acceptable amendment procedure in violation of § 402(b)(3). *See Curtiss-Wright*, 514 U.S. at 85 ("Having determined that the Curtiss-Wright plan satisfies § 402(b)(3), we do not reach the question of the proper remedy for a § 402(b)(3) violation."). This issue is irrelevant to the instant petition. Indeed, the question the Court bypassed in *Curtiss-Wright* is a different question than petitioner purports to present: *Curtiss-Wright* left open the issue of the proper remedy for § 402(b)(3) violations, but this case does not even allegedly involve a § 402(b)(3) violation. Moreover, the Court *declined* to reach the remedy question in *Curtiss-Wright*; its decision *not* to reach the issue precludes petitioner's claim that the decision below conflicts with this Court's authority.

Finally, even if the question left open in *Curtiss-Wright* were somehow presented upon this petition—which it is not—that question is now a manifestly unsuitable candidate for certiorari. Since *Curtiss-Wright* was decided, a broad and firm consensus has developed among the courts of appeals regarding the proper remedy when a plan entirely lacking an amendment procedure attempts an amendment: the circuits now uniformly hold that such amendments may be invalidated only upon a showing of bad faith, active concealment, or detrimental reliance. *See, e.g.*, *Murphy* v. *Keystone Steel & Wire Co.*, 61 F.3d 560, 569 (7th Cir. 1995) ("technical violations of ERISA requirements do not justify relief absent a showing of bad faith, active concealment, or detrimental reliance"); *Adams* v. *Avondale Indus., Inc.*, 905 F.2d 943, 949 (6th Cir. 1990); *Aldridge* v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee*, 40 F.3d 1202, 1211 (11th Cir. 1994). Even the Third Circuit—which, in

the *Curtiss-Wright* opinion later overturned by this Court, had suggested that until an amendment procedure is adopted pursuant to § 402(b)(3), plan amendments are invalid—has reversed course, and now, along with the rest of the circuits, requires bad faith, active concealment, or some "substantive harm" to the beneficiary before a technical violation can create substantive liability. *See Ackerman* v. *Warnaco*, 55 F.3d 117, 124-25 & n.8 (3d Cir. 1995); *Lettrich* v. *J.C. Penney Co.*, 213 F.3d 765, 771 (3d Cir. 2000). Unanimously, these courts have reached the common-sense conclusion that "§ 1102(b)(3) [*i.e.*, ERISA § 402(b)(3)] allows recovery only where a breach of the provision has produced the harm that § 1102(b)(3) seeks to prevent: defeating an employee's legitimate expectation of benefits." *Murphy*, 61 F.3d at 569. Such uniformity in the lower court decisions plainly obviates the need for this Court's intervention.

At any rate, it bears reemphasis that the question left open in *Curtiss-Wright* is *not* the question petitioner purports to raise here. The question petitioner tries to raise—what remedy obtains when a plan with proper amendment procedures fails to follow them—has been less frequently litigated, but, as set forth *infra*, has yielded a similarly uniform body of decisions, all insisting on bad faith, active concealment, or detrimental reliance before ERISA liability will lie. And there is simply no basis whatsoever for petitioner's suggestion that this claim somehow conflicts with this Court's holding in *Curtiss-Wright*.

B. *Inter-Modal.*

Petitioner also suggests that the decision below conflicts with this Court's opinion in *Inter-Modal*. Pet. for Cert. 11. In that case, the Court held that ERISA § 510, which makes

it unlawful to discharge an employee for the purpose of interfering with his or her ERISA benefits, applies to non-vested welfare benefits as well as to vested pension benefits. The *Inter-Modal* court emphasized that "employer[s] may, of course retain the unfettered right to alter its promises," but also noted that "to do so, it must follow the formal procedures set forth in the plan." 520 U.S. at 516. The Court there expressed the uncontested principle that formal plan procedures are to be followed to the extent they apply to plan action. But it did not even remotely address the proper remedy in the event such procedures are *not* followed in every technical respect, and certainly did not set forth the proposition that an amendment is necessarily and automatically invalid if it was not adopted in strict compliance with every technical procedure set out in the plan. The proof of this is in the uniform body of lower court authority, in both the § 402(b)(3) context, *supra*, and in the context of plans with amendment procedures, *infra*, which harmonize this Court's *Inter-Modal* decision with a bad faith standard for invalidation. In light of these considerations, there can be no plausible claim that the Eleventh Circuit's decision conflicted with this Court's teaching in *Inter-Modal*.

III. There is no conflict of authority among the lower courts.

The petition also contends that the decision below conflicts with holdings of the Third and Seventh Circuits, which, petitioner claims, both "require[] that formal plan amendment procedures be followed in order to validly amend an ERISA plan." Pet. for Cert. 14-15. Petitioner simply misreads, or misrepresents, the relevant case law.

As to the Third Circuit, petitioner relies on *Ackerman* v. *Warnaco*, 55 F.3d 117 (1995). But *Ackerman*, like the Eleventh Circuit decision below, clearly *rejects* the view that any deviation from formal amendment procedures, without more, renders an amendment void *ab initio*. Rather, in *Ackerman*, the Third Circuit required that the plaintiff "demonstrate the presence of extraordinary circumstances" before relief (such as amendment invalidation) would be in order. 55 F.3d at 124. The court then explained that:

> Such [extraordinary] circumstances include situations where the employer has acted in bad faith, or has actively concealed a change in the benefit plan, and the covered employees have been substantively harmed by virtue of the employer's actions.

Id. at 125. Thus, there can be no question that, contrary to petitioner's assertion, the Third Circuit views bad faith, active concealment, or detrimental reliance (or some similar "extraordinary circumstance") as a precondition to ERISA liability, and that, accordingly, liability *cannot* attach for a mere technical violation of amendment procedure standing alone—just as per the Eleventh Circuit below. And to remove any conceivable doubt, the Third Circuit confirmed the active concealment, bad faith or detrimental reliance standard in *Lettrich* v. *J.C. Penney Co.*, 213 F.3d 765, 771 (3d Cir. 2000). The decision below is therefore entirely in accord with prevailing Third Circuit precedent. Petitioner's assertion to the contrary is baseless.

As to the Seventh Circuit, petitioner relies on *Albedyll* v. *Wisconsin Porcelain Co. Revised Retirement Plan*, 947 F.2d 246 (1991), to suggest a split in authority. But again,

plaintiff has misread the case. *Albedyll*, like the Eleventh Circuit decision below, clearly *rejects* the view that any deviation from formal amendment procedures, without more, renders an amendment void *ab initio*. Rather, liability in *Albedyll* was explicitly premised on a finding that "the participants were harmed by [the] violation [of amendment procedures]," and the Seventh Circuit affirmed the principle, endorsed in cases cited in *Albedyll*, that ERISA liability could not lie where "claimants had suffered no prejudice." *Id.* at 255. *Albedyll* is therefore entirely in accord with the decision below. And, here again, the Seventh Circuit has recently confirmed that technical violations, without more, will *not* void plan amendments: in *Murphy* v. *Keystone Steel & Wire*, *supra*, the court made clear that "technical violations of ERISA requirements do not justify relief absent a showing of bad faith, active concealment, or detrimental reliance," and that ERISA recovery will lie only where a technical violation "defeat[s] an employee's legitimate expectation of benefits." 61 F.3d at 569. Petitioner's claim of a circuit split is thus entirely without merit.

Here is the reality of the matter: there is no law anywhere to support petitioner's suggestion that a technical violation of a plan's amendment procedure requires invalidation of a plan amendment absent a showing of bad faith, active concealment, or detrimental reliance. Three district courts have passed upon the issue, and they agree that a showing of bad faith, active concealment or detrimental reliance is required. *See Alford* v. *Kimberly Clark Tissue Co.*, 14 F. Supp. 2d 1290, 1299 (S.D. Ala. 1998) ("[T]he court rejects the application of a per se invalidation rule . . . . [R]egardless of Scott Paper's failure to follow plan procedures in this case, the plan termination at issue must be considered valid absent a showing of active concealment, detrimental reliance, or

bad faith."); *Whitfield* v. *Torch Operating Co.*, 935 F. Supp. 822, 831 (E.D. La. 1996) (confirming "requirement that beneficiaries of a welfare benefit plan show active concealment, reliance to their detriment or substantial prejudice before a court may invalidate an amendment to a welfare benefit plan"); *Ross* v. *Rail Car America Group Disability Income Plan*, No. 8:99CV191, slip op. at 9 (D. Neb. June 15, 2000) ("Even if Canada Life had not amended the Policy in 1991 in the manner specified in the Policy's amendment provision, the amendment would still be valid because there is no evidence of bad faith, active concealment, or detrimental reliance that would justify granting [the claimant] a substantive remedy for any technical violation of the Policy's amendment provision."). And, as elaborated *supra*, every court of appeals to have considered the analogous issue of whether a plan amendment must be declared void simply because the plan did not conform with § 403(b)(3) now concludes that such an outcome is inappropriate absent a showing of bad faith, active concealment, or detrimental reliance.[4] There is no split of authority anywhere in the federal judiciary. And there is no question that the decision below is in complete accord with the unanimous position of the lower courts.

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[4] As petitioner points out, the district court in *Alford* did suggest that there was a split in authority, not on the issue purportedly presented here, but with respect to whether a § 403(b)(3) violation automatically rendered a plan amendment void. But the *Alford* court was reading bad law. It believed that the Third Circuit's *Curtiss-Wright* opinion, which was subsequently reversed by this Court, conflicted with "a larger number of courts" by concluding that failure to comply with § 403(b)(3) rendered any plan amendment ineffective. *See* 14 F. Supp. 2d at 1299. But (as elaborated *supra*) this aspect of the Third Circuit's *Curtiss-Wright* holding—while perhaps not expressly overruled by this Court—has clearly been abrogated by the precisely contrary reasoning and result in later Third Circuit cases, including *Ackerman* and *Lettrich*.

Petitioner claims to worry that the Eleventh Circuit decision portends a regime in which "Article III courts will now be required to develop a federal common law of bad faith, active concealment, and detrimental reliance to determine whether an amendment applies to a particular participant or beneficiary," thus undermining ERISA's goal of uniformity and certainty. Pet. at 12. The scenario petitioner frets about, however, doubles as a description of the current ERISA regime: bad faith, active concealment, and detrimental reliance *already play a prominent role* in the ERISA context, and those concepts have been created and informed by a well-developed common law in this area. See, for example, in the context of claims based on faulty summary plans, *Andersen* v. *Chrysler Corp.*, 99 F.3d 846, 859 (7th Cir. 1996) (requiring a showing of reliance, bad faith, or active concealment); *Aiken* v. *Policy Management Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993) (per curiam) (requiring a showing of reliance or prejudice); in the context of claims for breach of fiduciary duty under ERISA, *Daniels* v. *Thomas & Betts Corp.*, 263 F.3d 66, 73, 75 (3d Cir. 2001) (requiring a showing of detrimental reliance); *Adams* v. *Freedom Forge Corp.*, 204 F.3d 475, 492 (3d Cir. 2000) (same); in the context of equitable estoppel claims under ERISA, *Spink* v. *Lockheed Corp.*, 125 F.3d 1257, 1262 (9th Cir. 1997) (requiring a showing of detrimental reliance); *In re Unisys Corp. Retiree Medical Benefit ERISA Lit.*, 58 F.3d 896, 907 (3d Cir. 1995) (same); and in the context of technical violations of ERISA's reporting and disclosure provisions, *Watson* v. *Deaconess Waltham Hosp.*, 298 F.3d 102, 113 (1st Cir. 2002) (such violations generally do not give rise to substantive remedies outside § 1132(c) in the absence of exceptional circumstances, such as bad faith, active concealment, or fraud); *Panaras* v. *Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 789 (7th Cir. 1996) (no remedy under § 1132(a)(1)(B) for such violations, absent exceptional circumstances such as bad faith, concealment, or induced

reliance). As courts in all of these situations (and others) have recognized, refusal to allow such principles to inform ERISA jurisprudence would result in inefficient or irrational results—incurable and unintended windfalls to beneficiaries or sponsors, depending on the context. In light of the pervasive and necessary presence of these concepts in the ERISA context, petitioner's concerns in this regard are misplaced. The decision below implicates no split of authority, and the petition should be denied.

IV. The question presented cannot be raised on the facts of this case.

Additionally, it merits brief mention that the "bad faith" question petitioner presses on this Court is not properly raised on the facts of this case. The record evidence developed below made it crystal clear that the release amendment was adopted in complete conformity with the plan amendment provisions. The Plan's amendment provision begins with standard, unambiguous amendment language providing that "[t]he Company will have the right to amend the Plan from time to time." App. 7. Because a corporation necessarily acts through its directors, that provision is universally recognized as vesting in a corporation's board of directors complete authority to amend a plan. *See Curtiss-Wright*, 514 U.S. at 80. Thus, under the Plan's plain language, as well as this Court's precedent, the Plan amendment provision authorized the Barnett Board to amend the Plan. And it is undisputed that the Barnett Board *did* act, by proper board resolution, to amend the Plan at its November 19, 1997 meeting.

The question whether the Plan complied with its amendment procedures was extensively briefed in the Eleventh Circuit and argued strenuously before that court. Respondents do not raise the issue here in order to convince this Court of its merit: it is

evidently not the office of this Court to resolve disputed points of law and fact upon a petition for certiorari. The point, rather, is to emphasize that the "bad faith" issue petitioner purports to present rests on a logically prior factual predicate—that the release amendment was not adopted in accordance with the Plan amendment provisions—which is highly suspect and was powerfully contested below. The Eleventh Circuit ultimately declined to resolve whether the Plan amendment procedures had been followed, because the completely obvious lack of bad faith—and the concession by both parties that such bad faith was a precondition to invalidating the release amendment—gave the court an easier route to decision. But the rationale adopted below was the direct result of petitioner's strategic concession on the "bad faith" issue. Petitioner should not now be permitted to seek from this Court an effectively advisory opinion on a question which, but for petitioner's opportunistic litigating strategy, would very likely not lie at all.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT KOFMAN*
SUSAN TOEPFER
STEARNS, WEAVER, MILLER,
WEISSLER, ALHADEFF & SITTERSON
Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3200
Attorneys for Respondents

* *Counsel of Record*